United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 29, 2000

TO : Elizabeth Kinney, Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Federal Security, Inc., and James R. Skrzypek and Janice M. Skrzypek, individuals
Case 13-CA-38669-1

512-5009-0100
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512-5009-6733-3300

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by filing a state court malicious prosecution lawsuit against former employees in response to the filing of a meritorious unfair labor practice charge against the Employer.

FACTS

Federal Security, Inc. ("the Employer") contracted with the Chicago Housing Authority ("CHA") to provide security guard services at various multiresidence public housing sites in Chicago. In August of 1992, the security guards engaged in a walkout and were subsequently terminated by the Employer for abandoning their posts. In response to the Employer's action, terminated security guard Joseph Palm filed an unfair labor practice charge against the Employer. On January 27, 1993, a complaint issued alleging that the Employer violated Section 8(a)(1) by: threatening employees with discharge because they engaged in a protected work stoppage; and requesting the CHA to place some of the employees who engaged in the work stoppage on a "bar" list, preventing their continued employment at CHA buildings.

On August 18, 1995, the Board affirmed the ALJ's decision finding that the Employer violated Section 8(a)(1) of the Act by terminating employees for participating in the walkout. The ALJ found that the work stoppage was a protected exercise of Section 7 rights because the guards engaged in the walkout to protest working conditions, benefits and the terminations of fellow employee Smith and supervisory employee Short.[1] On September 9, 1998, the United States Court of Appeals, Seventh Circuit denied the Board's petition for enforcement of its Decision and Order. The Seventh Circuit determined that the walkout was

[1] Federal Security, Inc., 318 NLRB 413, 419-420 (1995).

unprotected because the security guards exposed the CHA residents to a heightened danger when they abandoned their posts.[2]

On June 2, 2000,[3] the Employer filed a lawsuit in Illinois state court against Palm and most of the former employees named in the earlier charge claiming they engaged in malicious prosecution, abuse of process, and conspiracy to commit these torts by maliciously filing the charge with an improper purpose and without probable cause. In support of its claims, the Employer alleges that in May of 1999, former security guard Davenport stated that the guards fabricated the reasons for the walkout in order to make it appear that the walkout was concerted union activity so that the NLRB would become involved, and "that the only reason the guards left their posts was to show support for and loyalty to Short after he was suspended."[4] On June 30, Palm filed the instant charge alleging that the Employer violated Section 8(a)(1) by filing the state court lawsuit.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by filing a baseless lawsuit in retaliation against employees for charge filing. We also conclude the suit is enjoinable as an unfair labor practice since it has an illegal objective.

1. Bill Johnson's

In Bill Johnson's Restaurants v. NLRB,[5] the Supreme Court held that the Board cannot halt the prosecution of a lawsuit alleged to be an unfair labor practice unless two conditions are met: (1) the lawsuit lacks a reasonable basis in fact or law; and (2) the plaintiff filed the suit with a motive to retaliate against conduct protected by the Act. Additionally, as the Court explained in footnote 5, the Board may enjoin as unfair labor practices suits that have

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[2] NLRB v. Federal Security, Inc., 154 F.3d 751, 757, 159 LRRM 2228, 2232 (7th Cir. 1998).

[3] All remaining dates are in 2000 unless otherwise indicated.

[4] Complaint, paragraph 45.

[5] 461 U.S. 731 (1983).

"an objective that is illegal under federal law," or which are preempted by the Board's jurisdiction.[6]

As to the element of baselessness, the Board is not permitted to usurp the traditional fact-finding function of the trial court. Thus, if a lawsuit raises genuine issues of material fact, the General Counsel may not proceed with a charge, but rather must stay the unfair labor practice proceedings until the judicial action has been concluded.[7] The Supreme Court also suggested that in determining whether a suit has a reasonable basis, the Board may draw guidance from the standards used in ruling on motions for summary judgment and directed verdicts.[8] The burden rests on the court plaintiff "to present the Board with evidence that shows his lawsuit raises genuine issues of material fact," and that there is prima facie evidence of each cause of action alleged.[9]

In determining whether a lawsuit has a retaliatory motive, the Board takes into consideration factors such as whether the lawsuit is motivated by and directly aimed at protected activity;[10] the baselessness of the lawsuit;[11]

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[6] Id. at 737-38 n. 5.

[7] Id. at 745-746. See also Beverly Health & Rehabilitation Services, 331 NLRB No. 121, slip op. at 3-4 and nn. 6-7 (August 8, 2000).

[8] Id. at 745 n.11. Under such analyses, the court presumes the facts alleged to be true and draws from the allegations every reasonable inference in the plaintiff's favor. See generally, Blum v. Morgan Guar. Trust Co., 709 F.2d 1463, 1466 (11th Cir. 1983); NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Halet v. Wend Invest. Co., 672 F.2d 1305, 1309 (9th Cir. 1982).

[9] 461 U.S. at 746 n. 12.

[10] BE & K Construction, 329 NLRB No. 68, slip op. at 10 (1999); Summitville Tiles, 300 NLRB 64 (1990) (lawsuit motivated by employees' and union's filing of Board charges and state court lawsuit against employer); H.W. Barss Co., 296 NLRB 1286 (1989) (lawsuit aimed at lawful picketing).

[11] Bill Johnson's, 461 U.S. at 747 (Board is permitted to consider the court's determination that a lawsuit is not meritorious in deciding whether it was retaliatory). See also Diamond Walnut Growers, Inc., 312 NLRB 61, 69 (1993),

prior animus against the defendant in the lawsuit;[12] and whether the lawsuit seeks damages in excess of mere compensatory damages.[13]

We conclude initially that the Employer's lawsuit was filed in retaliation against Palm's protected filing of the unfair labor practice charge since it is aimed directly at the charge.[14] The fact that the suit seeks punitive damages is further proof of its retaliatory nature.[15] Since the lawsuit has a retaliatory motive, it can be attacked under Bill Johnson's if it has no reasonable basis in law or fact.

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enfd. 53 F.3d 1085 (9th Cir. 1995); Phoenix Newspapers Inc., 294 NLRB 47 (1989).

[12] Summitville Tiles, 300 NLRB at 66; Machinists Lodge 91 (United Technologies), 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991).

[13] See, e.g., Diamond Walnut Growers, 312 NLRB at 69; Phoenix Newspapers, 294 NLRB at 49-50.

[14] The filing and maintenance of a lawsuit because an employee or union filed charges with the Board clearly is retaliatory. See Operating Engineers, Local 520 (Alberici Construction Co.), 309 NLRB 1199, 1200 (1992), enf. denied 15 F.3d 677 (7th Cir. 1994); Summitville Tiles, 300 NLRB at 65-66. We note that the Employer filed the suit against Palm and most of the guards named in the charge even though Palm was the only charging party. It is not clear whether it is appropriate under Illinois law to maintain a malicious prosecution action against employees who are not charging parties. Illinois courts have not passed on the question of who may be liable for initiating an administrative proceeding. However, a defendant in a malicious prosecution suit may be held liable for initiating a criminal prosecution if the plaintiff can prove that the defendant "initiated the criminal proceeding or that his participation in the proceeding was of so active and positive a character as to amount to advice and co-operation." De Correvant v. Lohman, 228 N.E.2d 592, 595 (Ill. App. Ct. 1967). Thus, an action against the employees in these circumstances may be plausible if the employees actively participated in the charge filing.

[15] See cases cited *supra* note 12.

We conclude that the Employer's malicious prosecution and corresponding conspiracy claims lack a reasonable basis because the Employer has failed to establish a genuine issue of material fact as to the first necessary element of the malicious prosecution claim. To establish a claim for malicious prosecution under Illinois law, the plaintiff must show: (1) the defendant brought the underlying suit maliciously; (2) the underlying suit was brought without probable cause; (3) the former action was terminated in plaintiff's favor; and (4) plaintiff suffered a special injury or damage beyond the usual expense, time or annoyance in defending a lawsuit.[16]

In order to show the first element, that the defendant brought the underlying claim maliciously, the plaintiff must present evidence establishing that the defendant was "actuated by improper and indirect motives."[17] Thus, the plaintiff in a malicious prosecution action is required to show that the defendant began a proceeding against the plaintiff "with some ulterior purpose other than seeking the benefit that it would receive from a decision in its favor in such action."[18]

In its lawsuit, the Employer alleges that Palm, on behalf of himself and the guards, filed the charge "for improper purposes and with the intent to harass" the Employer.[19] The only evidence offered by the Employer of the guards' ulterior purpose in filing the charge is an alleged May 1999 statement by discriminatee Davenport that the guards' only reason for leaving their posts was to show support for and loyalty to Short, and that the employees wanted to make it appear to the Board that the walkout was

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[16] Cult Awareness Network v. Church of Scientology, et al., 685 N.E.2d 1347, 1350 (Ill. 1997), cert. denied 523 U.S. 1020 (1998). While it does not appear that the Illinois test would require the federal standards of "bad faith" and malice for malicious prosecution actions set forth in LP Enterprises, 314 NLRB 580 (1994), we note that the Employer alleges "malice."

[17] See Hulcher v. Archer Daniels Midland Co., 409 N.E.2d 412, 416 (Ill. App. Ct. 1980).

[18] Franklin v. Grossinger Motor Sales, Inc., 259 N.E.2d 307, 309 (Ill. App. Ct. 1970). See also Hulcher v. Archer Daniels Midland Co., 409 N.E.2d at 416.

[19] Complaint, paragraph 53.

concerted union activity.[20] However, Davenport's alleged statement fails to establish a factual dispute as to the existence of an ulterior purpose where the ALJ, with Board approval, previously concluded that a walkout solely to protest Short's discharge constituted protected activity. Accordingly, Davenport's statement, even if true, fails to present evidence that Palm filed the charge "maliciously" within the meaning of Illinois law, i.e. with some ulterior purpose other than seeking the benefit that he would receive from a decision in his favor. Thus, Palm would have received the same benefit from a Board decision in his favor if he had simply alleged the guards were terminated because they engaged in "protected concerted activity."

Moreover, the allegation of improper motive or ulterior purpose in Davenport's statement was already litigated in the underlying proceeding.[21] Indeed, the Board affirmed the ALJ's determination that the termination of Short was one of several factors that precipitated the walkout. In fact, the ALJ specifically rejected the Employer's argument that Short's termination was the sole reason for the walkout.[22] Thus, the Employer's only argument in support of the improper purpose allegation was litigated and rejected in the underlying proceeding. Accordingly, the Employer has failed to establish a genuine issue of material fact as to whether the Board charge was filed with an ulterior purpose and its malicious prosecution and conspiracy claims are, therefore, baseless.

We also conclude the abuse of process and corresponding conspiracy claims based on the filing of the charge are baseless for several reasons. First, it does not appear

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[20] Complaint, paragraph 45. Palm's original charge alleged the guards were terminated "because they engaged in protected, concerted union activities in support of Local 73."

[21] See IMAC Energy, Case 10-CA-27458, Advice Memorandum dated May 20, 1994, where we determined that the employer's lawsuit against certain discriminatees and the union were baseless where it alleged factual issues that had already been presented to and decided by the Board in the underlying unfair labor proceeding. Id. at p. 7-8.

[22] Federal Security, Inc., 318 NLRB at 420, the ALJ stated that "the termination of Short was one of the several factors that precipitated the walkout. Contrary to the [Employer's] contention, however, the evidence establishes that it was by no means the only factor."

that Illinois permits an abuse of process claim to be based on the initiation of proceedings before an administrative agency. In Kirchner v. Greene,[23] an Illinois appellate court expressly rejected expanding the tort of abuse of process to include proceedings before a quasi-judicial administrative body. The court stated that "such expansion is baseless in the law and would be contrary to the narrow strictures to which courts have confined this tort."[24]

Second, even if Illinois permitted an action for abuse of process to include administrative proceedings, the claim is baseless because the Employer failed to present a genuine issue of material fact as to the first element. To prove an abuse of process claim under Illinois law, the plaintiff must prove: (1) the existence of an ulterior purpose or motive; and (2) some act in the use of the legal process not proper in the regular prosecution of such proceedings.[25] As previously discussed, the Employer has failed to present a genuine issue of material fact as to whether the charge was filed with an ulterior purpose. Furthermore, the Employer failed to plead the second element of his abuse of process claim. As previously noted, the lawsuit pleads an improper purpose in filing the charge, however, it fails to allege an act in the use of the legal process not proper in the regular prosecution of such proceedings.[26] Accordingly, the abuse of process claim is baseless because the Employer failed to present a genuine issue of material fact and failed to plead all elements of the claim.

2. Unlawful Objective

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[23] 691 N.E.2d 107, 117 (Ill. App. Ct. 1998), appeal denied 699 N.E.2d 1032 (Ill. 1998)(table).

[24] Id. at 117. The definition of process in the context of an abuse of process claim is strictly construed. In Illinois, process is defined as "any means used by the court to acquire or exercise jurisdiction over a person or over specific property." Arora v. Chui, 664 N.E.2d 1101, 1108 (Ill App. Ct. 1996), appeal denied 671 N.E.2d 726 (Ill. 1996) (table).

[25] See Kirchner v. Greene, 691 N.E.2d at 116; Arora v. Chui, 664 N.E.2d at 1108.

[26] See Holiday Magic, Inc. v. Scott, 282 N.E.2d 452, 457-458 (Ill. App. Ct. 1972)(where Illinois court found plaintiff's abuse of process complaint deficient where it only alleged that prior suit was filed with an ulterior purpose).

We further conclude that the entire lawsuit is immediately enjoinable since the Employer's objective in filing the suit is unlawful under footnote 5 of Bill Johnson's. The Court in Bill Johnson's explained in footnote 5 that the Board may enjoin suits that have "an objective that is illegal under federal law."[27] Thus, without regard to whether the suit is baseless and retaliatory under the above analysis, the Employer's suit is immediately enjoinable if it has an illegal objective.

An illegal objective is found where a lawsuit seeks a result that is incompatible with a prior Board ruling. In Teamsters Local 776 (Rite Aid),[28] the respondent union filed and maintained a lawsuit seeking enforcement of an arbitration award that was in direct conflict with a prior UC representational determination. In finding that the lawsuit fell within the illegal objective exception to Bill Johnson's, the Board stated, "[i]n our view, where the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the 'illegal objective' exception to Bill Johnson's."[29] In the instant case, the Employer filed a lawsuit seeking a determination that the guards engaged in malicious prosecution and abuse of process when Palm filed a charge with the Board. Such a result is clearly incompatible with the prior Board decision finding merit to the charge. Indeed, the Employer is unlawfully seeking to relitigate the merit of the charge by petitioning the court to consider whether the charge was filed with malicious intent.[30] Thus,

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[27] 461 U.S. at 737-38 n.5.

[28] 305 NLRB 832 (1991), enfd. 973 F.2d 230 (3rd Cir. 1992), cert. den. 507 U.S. 959 (1993).

[29] Id. at 835.

[30] See Monroe Manufacturing, Case 15-CA-14061, Advice Memorandum dated February 3, 1997, where we concluded that certain allegations of the employer's RICO suit against the union fell within the unlawful objective exception to Bill Johnson's. The lawsuit alleged that the union filed charges with the Board that contained willfully false statements even though such charges had either been the subject of a formal Board settlement or found meritorious by an ALJ. We determined that the allegations in the suit were unlawful to the extent they were filed in effort to relitigate the merits of the charges by alleging they were filed with malicious intent. Moreover, we determined that the employer's lawsuit, attacking the prior Board charges,

the Employer's objective in filing the lawsuit is unlawful and the suit is immediately enjoinable.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by filing and maintaining a baseless lawsuit against former employees in retaliation for the filing of a meritorious unfair labor practice charge. Furthermore, the Employer's lawsuit is immediately enjoinable as an unfair labor practice since it has an illegal objective under footnote 5 to Bill Johnson's.[31]

B.J.K.

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unlawfully aimed at achieving a result incompatible with the ALJ determinations and formal Board settlements. Id. at p. 10-11. See also IMAC Energy, *supra* note 21 at p. 6-7, where we determined that the employer's lawsuit had an illegal objective where certain allegations in support of the suit raised the same arguments that were litigated in the underlying Board proceedings.

[31] We note that this decision does not leave the Employer without redress if the statements made in the charge were willfully false. Indeed, 18 U.S.C. Section 1001 prohibits individuals from making "any false, fictitious or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States." In fact, the Board's printed unfair labor practice charge form warns that "willful false statements on [the] charge can be punished under 18 U.S.C. 1001."